**MOHD. OSMAN PAWAN**

**v.**

**PUBLIC PROSECUTOR**

SUPREME COURT, KUALA LUMPUR
LEE HUN HOE CJ (BORNEO)
MOHD. YUSOFF MOHAMED SCJ
AJAIB SINGH SCJ
[CRIMINAL APPEAL NO. 47 OF 1986]
17 MARCH 1989

***CRIMINAL LAW:*** *Dangerous Drugs - Trafficking - Whether the prosecution had failed to establish a continuous chain of evidence relating to the exhibits, the subject matter of the charge.*

This was an appeal against both conviction and sentence by the appellant who was found guilty, convicted and sentenced to death on a charge of trafficking in dangerous drugs, an offence punishable under s. 39B(2) of the Dangerous Drugs Act 1952.

The facts were that on 17 March 1983 at 12.35 p.m. the appellant was seen entering the flat and went straight to his room which was previously kept locked. He carried a yellow plastic bag, Exhibit P6 with him, which he later placed on a chair in the hall of the flat. As the appellant came out from his room and locked it, Senior Superintendent of Customs Lam Ahmad bin Hassan (PW3) and his men entered the flat. After a short conversation the appellant brought them to his room where PW3 recovered a canvas bag, Exhibit P3 among children's clothing in a box. The bag was locked with a small padlock and appellant had no key to it. Appellant was then taken to Customs Department with Exhibits P3 and P6.

At 1.40 p.m. the same day, in the office of PW3 appellant was asked to open Exhibit P6 and it was found to contain what later was ascertained to be cannabis. It was counted by a customs officer PK738, in the presence of appellant and found to have 6 bundles of 50 rolls each. The locked canvas bag, Exhibit P3 was forced open by a Customs Officer, also in the appellant's presence. It was found to contain 3 big packages and one small one and on being counted by the same Customs Officer, the big packages contained 5 smaller packets, and each packet was found to contain 10 bundles. They were also ascertained to be cannabis.

At 5.45 p.m. the same day, 17 March 1983, PW3 handed the appellant and all exhibits to Superintendent of Customs Zainal Abidin bin Taib (PW7) who kept all the exhibits in the department's strongroom. He handed the appellant over to the police. According to PW7, he received altogether 300 rolls of cannabis in Exhibits P6 and 4,000 rolls in Exhibit P3. On 19 March 1983, PW7 labelled all the exhibits and on 21 March 1983 he packed and sealed them and sent them to the chemist. On 30 May 1983, PW7 collected them back from the chemist with the chemist's report.

The chemist (PW1) in evidence said that he received 4 packages marked A3 to A6 containing 3997 rolls of plant materials, which upon analysis, was found to be cannabis. He also examined a yellow plastic bag with a newspaper package marked B1 containing 299 rolls, which, on analysis, was also found to be cannabis.

The main ground of appeal was that the prosecution had failed to establish a continuous chain of evidence relating to the exhibits, the subject matter of the charge, and in that event the learned Judge has erred in law in calling for the defence of the appellant. It was argued that the exhibits recovered were not necessarily the same drugs that were sent to the chemist.

**Held:**

**[1]** In a serious case, such as this, it is pertinent to emphasise again that investigation officers should not treat the custody of exhibits lightly so as to leave a gap in the chain of evidence relating to the exhibits before their production to the Court.

**[2]** In the present case it is noted, as shown in evidence, that the relevant exhibits, Exhibit P3 and P6, were kept in a common strongroom with other exhibits relating to other cases. They were not labelled nor marked. No register was kept of what order exhibits were kept in the room together with the present exhibits. The possibility of sending different exhibits to chemist for analysis was highly probable in a situation such as this. This is more so when there is a discrepancy discovered in the amount of drugs, as the exhibits in this case, received by the chemist was less than the amount allegedly sent to him for analysis.

**[3]** It is observed in the present case that the Customs Officer PK738 who counted the exhibits in the presence of the appellant was not called to give evidence but instead the prosecution made him available to the defence. But when the prosecution evidence falls short of a *prima facie* case at the end of the case for the prosecution, such an action is of no avail to close the gap arising in the prosecution case.

**[4]** It is also observed that the law is clear that it is unnecessary to call every witness to ensure that there is no break in the chain of evidence. But when there is doubt as to the identity of the exhibits, as in this case, failure to adduce evidence to provide the necessary link in the chain of evidence would be fatal to the prosecution case. In the present case we find that there is such a failure and as such the conviction under s. 39B(1)(a) cannot stand.

**[5]** Nevertheless the evidence shows that the appellant had admitted unreservedly that he bought the cannabis found with him in the yellow plastic bag from one Nasaruddin. He said he paid for 300 sticks but was given only 299 of them. The chemist had ascertained that they were cannabis weighing 127.41 grammes. On those facts, the appellant had committed an offence contrary to s. 6 and in that event his conviction is substituted to one under s. 6 of the Dangerous Drugs Act.

*[Appeal allowed. Conviction and sentence substituted to 5 years imprisonment.]*

**Cases referred to:**

*Abdullah Zawawi v. Public Prosecutor [1985] CLJ (Rep) 19*
*Su Ah Ping v. Public Prosecutor [1980] 1 MLJ 75*
*Teoh Hoe Chye & Yap Teong Tean v. Public Prosecutor [1987] 1 CLJ (Rep) 386*

**Legislation referred to:**

Dangerous Drugs Act 1952, ss. 39B(1)(a), B(2)

*For the appellant - Mohd. Shafee Abdullah; M/s. Shafee & Co.*
*For the respondent - Abdul Hamid Embong, SFC, (Attorney-General's Chambers, Malaysia)*

**JUDGMENT**

**Mohd. Yusoff Mohamed J:**

The appellant, Mohd. Osman b. Pawan, was tried by the Kuala Lumpur High Court on the following charge:

> That you on 17 March 1983 at about 12.35 p.m., at No. 16B, Jalan Kovil Hilir, Off Jalan Ipoh, Kuala Lumpur in Wilayah Persekutuan, did on your own behalf traffic in dangerous drugs, to wit 1906.15 grammes of cannabis and that you have thereby committed an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 and punishable under s. 39B(2) of the same Act.

He was found guilty, convicted and sentenced to death. He now appeals against both conviction and sentence.

The facts are these:

On 16 and 17 March 1983 a team of Customs Officers, acting on information received, kept surveillance on premises No. 16B Jalan Kovil Hilir, Off Jalan Ipoh, Kuala Lumpur. It was a flat on the second floor of a four storey building. The flat was leased out by rooms and the appellant occupied one of them. One customs officer (PW2) occupied another room.

On 17 March 1983 at 12.35 p.m. the appellant was seen entering the flat and went straight to his room which was previously kept locked. He carried a yellow plastic bag, Exhibit P6, with him, which he later placed on a chair in the hall of the flat.

As the appellant came out from his room and locked it, Senior Superintendent of Customs Lam Ahmad b. Hassan (PW3) and his men entered the flat. After a short conversation appellant brought them to his room where PW3 recovered a canvas bag, Exhibit P3, among children's clothing in a box, Exhibit P2. The bag was locked with a small padlock. Appellant had no key to it.

Appellant was then taken to Customs Department with Exhibit P3 and P6.

At 1.40 p.m. the same day, in the office of PW3, the appellant was asked to open the package wrapped in newspaper in Exhibit P6. When it was opened, it was found to contain what later was ascertained to be cannabis. It was counted by a Customs Officer PK738, in the presence of the appellant, and found to have 6 bundles of 50 rolls each.

The locked canvas bag, Exhibit P3, was forced opened by a Customs Officer, also in appellant's presence. It was found to contain 3 big packages and one small one. On being counted by the same Customs Officer, the big packages contained 5 smaller packets, and each packet was found to contain 10 bundles. They were also ascertained to be cannabis.

At 5.45 p.m. the same day, 17 March 1983, PW3 handed the appellant and all the exhibits to Superintendent of Customs Zainal Abidin bin Taib (PW7), who kept all the exhibits in the department's strong room. He handed appellant to police custody. According to PW7, he received altogether 300 rolls of cannabis in Exhibit P6, and 4,000 rolls in Exhibit P2.

On 19 March 1983, PW7 labelled all the exhibits and on 21 March 1983 he packed and sealed them and sent them to the chemist. On 30 May 1983, PW7 collected them back from the chemist with the chemist's report.

The chemist (PW1) in evidence said that he received 4 packages marked A3 to A6 containing 3997 rolls of plant material, which, upon analysis, found to be cannabis. He also examined a yellow plastic with a newspaper package marked B1 containing 299 rolls, which, on analysis, also found to be cannabis.

The main ground of appeal was that the prosecution had failed to establish a continuous chain of evidence relating to the exhibits, the subject matter of the charge, and in that event the learned Judge has erred in law in calling for the defence of the appellant. Counsel for appellant, though not disputing that the exhibits were cannabis, argued that both prosecution witnesses, PW3 and PW7, were quite emphatic that they found 300 rolls in Exhibit P6 and 4000 rolls in Exhibit P3 on 17 March 1983, but when they reached the chemist on 21 March 1983 the packages were found to contain 299 rolls and 3997 rolls of cannabis respectively. With the 4 missing rolls received by the chemist it was argued that possibly different exhibits were sent to him. It was also submitted that the evidence shows the shoddy manner the exhibits were kept in the customs strong room. They were not labelled until 2 days later and it took another 2 days before they were packed and sealed on 21 March. For these reasons it was argued that the exhibits recovered were not necessarily the same drugs that were sent to the chemist.

We feel the point was correctly taken by the appellant. In a serious case, such as this, it is pertinent to emphasise again that investigation officers should not treat the custody of exhibits lightly so as to leave a gap in the chain of evidence relating to the exhibits before their production to the Court.

In the present case, it is noted, as shown in evidence, that the relevant exhibits, Exhibit P3 and P6, were kept in a common strong room with other exhibits relating to other case. They were not labelled nor marked. No register was kept of what other exhibits were kept in the room together with the present exhibits. The possibility of sending different exhibits to chemist for analysis was highly probable in a situation such as this. This is more so when there is a discrepancy discovered in the amount of drugs, as the exhibits in this case, received by the chemist was less than the amount allegedly sent to him for analysis.

It is observed in the present case that the customs officer PK738, who counted the exhibits in the presence of the appellant, was not called to give evidence but instead the prosecution made him available to the defence. But when the prosecution evidence falls short of a *prima facie* case at the end of the case for the prosecution, such an action is of no avail to close the gap arising in the prosecution case (see *Abdullah Zawawi v. Public Prosecutor* [1985] CLJ (Rep) 19.

It is also observed that the law is clear that it is unnecessary to call every witness to ensure that there is no break in the chain of evidence (see *Su Ah Ping v. Public Prosecutor* [1980] 1 MLJ 75). But when there is doubt as to the identity of the exhibits, as in this case, failure to adduce evidence to provide the necessary link in the chain of evidence would be fatal to the prosecution case. (*Teoh Hoe Chye & Yap Teong Tean v. Public Prosecutor* [1987] CLJ (Rep) 386). In the present case we find that there is such a failure and as such the conviction under s. 39B(1)(a) cannot stand. We set aside the conviction and sentence. To that extent the appeal is allowed.

Nevertheless the evidence shows that the appellant had admitted unreservedly that he bought the cannabis found with him in the yellow plastic bag from one Nasaruddin. He said he paid for 300 sticks but was given only 299 of them. They were mainly, he said, for his own consumption.

The contents of this yellow plastic bag was examined and analysed by the chemist and he ascertained that they were cannabis weighing 127.41 grammes.

Cannabis is defined as a dangerous drug under s. 2 and 1st Schedule of Dangerous Drugs Act 1952. Possession of this drug of less than 200 grammes in weight (presumed weight for trafficking) without authorisation under s. 7 is contrary to and punishable under s. 6 of the Act.

In our view, on those facts, the appellant had committed an offence contrary to s. 6 and in that event his conviction substituted to one under s. 6 of the Act. Punishment prescribed under s. 6 of the Act is RM10,000 fine or imprisonment not exceeding 5 years or both. Because of the seriousness of the nature of the offence of possession of drugs in the country, we feel that a custodial sentence is imperative in the public interest.

Cognizant of that situation the sentence meted out on the appellant is now substituted to one of 5 years imprisonment. This sentence is to run from date of his conviction in the Court below, 30 July 1986.

Appeal allowed. Conviction and sentence substituted accordingly.

Also found at [1989] 2 CLJ 388